IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2582 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KHANBHAI ESOOFBHAI

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 2582 of 2004

MR PARESH M DAVE for Petitioner No. 1-2

MS DHARMISHTA RAVAL for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision: 12/04/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

Rule. Ms Dharmishta Raval, learned senior standing counsel for the Central Government waives service of Rule for the respondents.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. What is challenged in this petition under Article 226 of the Constitution is the communication dated 8.1.2004 (Annexure "L") from the Superintendent, Central Excise, AR-1, SBY-Alang and the endorsement below the same addressed to the petitioner calling upon the petitioner to make payment of the outstanding Government dues arising from the Order-in-Original No.BVR/764 to 807/97 dated 24.12.1997/5.1.1998.

3. We have heard Mr Paresh M Dave, learned counsel for the petitioners and Ms Dharmishta Raval, learned senior standing counsel for the Central Government, Assistant Commissioner of Central Excise, Bhavnagar and the Superintendent of Central Excise, ASBY, Alang, the respondents herein.

4. It appears that the above numbered order-in-original was passed pursuant to the 44 show cause notices including the show cause notice issued against the present petitioner No.1 (hereinafter referred to as "the petitioners"). The petitioners, however, did not appear in response to the show cause notice nor did they file any reply. It appears that in case of many other parties also, they did not appear in response to the show cause notice. Ultimately, the Assistant Commissioner, Bhavnagar passed the order confirming the demand of the respective amounts as mentioned in the show cause notice/s. It appears that the petitioners challenged the said order in an appeal which came to be dismissed as time barred with the result that the appellate authority had no occasion to go into the merits of the petitioners' challenge to the above order. The petitioners, therefore, filed Special Civil Application No.11968 of 2002. In the said petition, affidavit in reply dated 22.1.2003 came to be filed by Mr Satish Rajaram Vichare, Assistant Commissioner, Central Excise, Bhavnagar making, inter-alia, the following statements regarding merits of the controversy between the parties :-

"It is further submitted that the petitioners have clearly the material from the three ships namely (1) ZENTENO (2) SERREANO (3) ZAKIR HUSSAIN after filing the bill of entries but the department has issued three demand notices against the petitioners claiming for recovery of Rs.1,84,93,098/-, against each Order-in-Original Nos. 764 to 807/97 dated 24.12.1997 for availing

wrongly modvat credit. But actually the petitioners have availed modvat credit of duty on two vessels (1) ZENTENO (2) SERREANO and relatable to the exempted final products amounted to Rs.17,07,520/- and the same was accordingly reversed by the petitioners on 01.03.1994 as is apparent from RG-23-A-Pt.II. Since, no modvat credit was availed of duty on third vessel namely ZAKIR HUSSAIN, hence, the question of reversing any credit on clearance of the goods of Chapter 72 and 73 obtained from breaking up of ship ZAKIR HUSSAIN can not and does not arise.

7. In the instant case, the first show cause notice dated 15.09.1993 covered the period from March, 1993 to July, 1993, the second show cause notice dated 04.01.1994 covered the period from August, 1993 to November, 1993 and the third show cause notice dated 22.06.1994 covered the period from December, 1993 to February, 1994 and amounts of Rs.49,50,190/-, Rs.83,04,307/- and Rs.52,38,682/- respectively were demanded thereunder allegedly being the modvat credit in respect of the quantity of goods falling under chapter No.7230.00 cleared under exemption for which input credit of CVD were allegedly by the petitioners.

Thus, total amount of Rs.1,84,93,098/- was demanded under the above referred three show cause notices out of which the credit taken by the petitioners firm as regard of vessel "SERRANA" and vessel "ZETNTENO" was only of Rs.10,82,840/- and Rs.19,94,560/-, each respectively, where no credit of the CVD paid on vessels ZAKIR HUSSAIN was taken by the petitioners. Hence, when the petitioners have not taken modvat credit on vessel ZAKIR HUSSAIN, the question of the reversal or recovery does not arise."

(emphasis supplied)

When the petition reached hearing, this Court passed the following order on 28.3.2003 :-

"After the arguments, learned counsel for the petitioners states that the petitioners will respond to the recovery notice dated 21.11.2002, issued by the Superintendent of Central Excise, in view of the above affidavit filed in the present petition by the respondent No.2, and

therefore, they seek permission to withdraw this petition. The petition is rejected as withdrawn. Notice is discharged with no orders as to costs."

5. In view of the above, the petitioners replied vide letter dated 5.5.2003 (Annexure "J") to the Superintendent's letter dated 21.11.2002. Inspite of the aforesaid reply and further reminder dated 19.8.2003 (Annexure "K"), the Superintendent of Central Excise at Alang, Bhavnagar, respondent No.3 herein, has not looked into the matter and instead reiterated in the impugned communication dated 8.1.2004 (Annexure "L") the stand earlier adopted that the petitioners are liable to make payment of duty as per the order-in-original dated 24.12.1997/5.1.1998 since there was no stay granted by this Court.

6. Mr Paresh M Dave for the petitioners has submitted that in view of the aforesaid clear stand taken by the Assistant Commissioner of Central Excise, Bhavnagar that in respect of the two vessels the modvat credit taken by the petitioner earlier was reversed and in case of the third vessel, no modvat credit was taken, there was no liability to pay any duty.

7. On the other hand, Ms Dharmishta Raval, learned senior standing counsel for the Central Government has submitted that while the above factual statements made in the Assistant Commissioner's affidavit filed in Special Civil Application No.11968 of 2002 are correct, the complication has arisen because the petitioners chose not to remain present at the hearing of the show cause notice before the Assistant Commissioner which resulted into the order-in-original fastening duty liability on the petitioners.

8. Having heard the learned counsel for the parties, we are of the view that when in the affidavit in reply filed in Special Civil Application No.11968 of 2002 the aforesaid clear factual statements were made by the Assistant Commissioner and while disposing of the petition on 28.3.2003, the petitioners were permitted to respond to the recovery notice dated 21.11.2002 issued by the Superintendent in view of the aforesaid affidavit filed by the Assistant Commissioner, the Superintendent ought to have looked into the petitioners' reply dated 5.5.2003 (Annexure "J") and the reminder dated 19.8.2003 (Annexure "K") and in any case ought to have referred the matter to the Assistant Commissioner. In view of the statements made in the aforesaid affidavit, the Superintendent ought not to have proceeded further with

the recovery notice.

9. However, even while directing the respondents to desist from acting upon the said recovery notice, this Court does find some substance in the submission made by the learned Senior Standing Counsel for the Central Government that if the petitioners had been careful enough in the original proceedings, the correct factual aspects would have been brought to the notice of the Assistant Commissioner at that point of time avoiding the two rounds of litigation. Hence, the petitioners are required to be directed to pay costs of these petitions.

10. In the result, the petition is allowed. The respondents are directed not to act upon the recovery notice dated 21.11.2002 (Annexure "G") and the further notice dated 8.1.2004 (Annexure "L") and to act in accordance with the statements made in the affidavit dated 22.1.2002 filed by the Assistant Commissioner of Central Excise, Bhavnagar in Special Civil Application No. 11968 of 2002 as quoted in para 4 of this judgment. However, in view of the peculiar facts and circumstances of the case, as discussed above, the petitioners shall pay the respondents costs quantified at Rs.10,000/- (Rupees Ten thousand only) within one month from today.

11. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

sundar/-